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JOHN F. DAVIS,

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 490.

SAMUEL H. SHEPPARD,

Petitioner,

vs.

E. L. MAXWELL, Warden,

Respondent.

REPLY BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND OHIO CIVIL LIBERTIES UNION.

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TABLE OF CONTENTS.

Reply Brief of Amici Curiae, American Civil Liberties Union and Ohio Civil Liberties Union 1

I. The "Probable Effect" and "Actual Effect" of the Trial and Pretrial Publicity Was Not Prejudicial to the Accused 3

A. The newspaper publicity considered as a whole demonstrates that defendant, his family and his counsel induced or received favorable publicity as well as damaging news media coverage 6

B. The damaging publicity was diluted by the offer of evidence at the trial similar to the published matter 8

C. The damaging publicity consisted of insinuations, surmise and conjecture rather than direct evidentiary proof of the guilt of the accused 10

D. The damaging publicity was diluted by the time of trial because it had occurred two months earlier 11

E. Newspaper publicity is not as damaging as television exposure 12

F. Selected letters to the editor refute any inference of prejudice 13

II. Petitioner Has Waived or Cannot Now Assert a Claim of Prejudicial Publicity 14

A. Defense counsel failed to exhaust his peremptory challenges in empanelling the jury 14

B. The news clippings now in issue were not offered in evidence at the jury trial 15

C. Defense counsel's summation to the jury waived or estopped a subsequent claim of prejudice ---------- 16

Conclusion ---------- 17

TABLE OF AUTHORITIES.

Cases.

Delaney v. United States, 199 F. 2d 107 (1st Cir. 1952) ----------5, 6, 15

Estes v. Texas, 381 U. S. 532 (1965) ----1, 4, 5, 6, 12, 16

Fahy v. Connecticut, 375 U. S. 85 (1963) ---------- 4

Irvin v. Dowd, 366 U. S. 717 (1961) ----------5, 11

Johnson v. Zerbst, 304 U. S. 458 (1938) ---------- 15

Krulewitch v. United States, 336 U. S. 440 (1949) -- 5

Marshall v. United States, 360 U. S. 310 (1959) ---- 6

Murchison, In re, 349 U. S. 133 (1955) ---------- 1

Rideau v. Louisiana, 373 U. S. 723 (1963) --1, 5, 6, 11, 12

Tumey v. Ohio, 273 U. S. 510 (1927) ----------1, 4

United States ex rel. Bloeth v. Denno, 313 F. 2d 364 (2d Cir. 1963) ----------6, 8, 10, 12

Texts.

Murphy & Newcomb, Experimental Social Psychology 961, 962, 965-966 (rev. ed. 1937) ---------- 13

Weld & Danzig, "A Study of the Way in Which a Verdict is Reached by a Jury," 53 Am. J. Psych. 518 (1940) ---------- 13

Wright, *Mass Communications: A Sociological Perspective* 49-73 (1959) ---------- 13

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Respondent concedes[1] that "there are * * * times when the very nature of the pretrial *newspaper* publicity is such that a court may reasonably infer therefrom, without examining the voir dire record, a conclusive presumption of * * * prejudice against an accused * * *."[2]

But respondent[3] denies, however, that this case presents one of those occasions of inherent prejudice for two principal (and several subsidiary) reasons:

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[1] A concession compelled by *Tumey v. Ohio*, 273 U. S. 510, 532 (1927), *In re Murchison*, 349 U. S. 133, 136 (1955), *Rideau v. Louisiana*, 373 U. S. 723 (1963) and *Estes v. Texas*, 381 U. S. 532 (1965). See discussion, pp. 12-15, brief in chief of *amici*.

[2] RB 54. References to respondent's brief throughout this brief will be by "RB" followed by a page number. Reference to the *amicus brief* of the Cuyahoga County Prosecuting Attorney will be by "PAB" followed by a page number. Emphasis and bracketed material, unless otherwise indicated, has been supplied.

[3] The arguments of the respondent and the Cuyahoga County Prosecutor as *amicus curiae* will, unless otherwise indicated, be considered together.

I. The "probable effect" and "actual effect" of the trial and pretrial publicity was not prejudicial to the accused, because:

A. The newspaper publicity considered as a whole demonstrates that defendant, his family and his counsel induced or received favorable publicity as well as damaging news media coverage.[4]

B. The damaging publicity was diluted by the offer of evidence at the trial similar to the published matter.[5]

C. The damaging publicity consisted of insinuations, surmise and conjecture rather than direct evidentiary proof of the guilt of the accused.[6]

D. The damaging publicity was diluted by the time of trial because it had occurred two months earlier.[7]

E. Newspaper publicity is not as damaging as television exposure.[8]

F. Selected letters to the editor refute any inference of prejudice.[9]

II. Petitioner has waived or cannot now assert a claim of prejudicial publicity, because:

A. Defense counsel failed to exhaust his peremptory challenges in empanelling the jury.[10]

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[4] RB 55, 68-71; PAB 29-33, 35-39.

[5] RB 64-68, 83-84.

[6] RB 55-56, 71; PAB 10.

[7] RB 58-59.

[8] RB 55, 60-61.

[9] RB 73, Appendices A, B, C and D.

[10] RB 78.

B. The news clippings now in issue were not offered in evidence at the jury trial.[11]

C. Defense counsel's summation to the jury waived or estopped a subsequent claim of prejudice.[12]

These contentions will be considered in sequence below.

I.

THE "PROBABLE EFFECT" AND "ACTUAL EFFECT" OF THE TRIAL AND PRETRIAL PUBLICITY WAS NOT PREJUDICIAL TO THE ACCUSED.

Respondent has set up a standard against which the facts of the instant case are to be measured before inherent prejudice may be found—a standard which ignores completely this Court's recent judicial history. Respondent claims that before inherent prejudice may be presumed from the content of the publicity surrounding a criminal trial without a showing of actual prejudice, there must be "a finding that the *probable* effect of [the publicity] was to create a lasting opinion of guilt in the minds of the jurors" [13] and that such a presumption of prejudice "is justified only where the probable effect would be that *no reasonable man*, possessed of the honesty, integrity, intelligence, and sense of responsibility and fair play we normally accord to jurors, *could help but come to a conclusion from a reading of the publicity that the accused was guilty of the crime charged against him.*" [14]

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[11] PAB 11.

[12] PAB 14.

[13] RB 63.

[14] RB 61.

To suggest that no presumption of prejudice may arise unless the probable contamination of *all of the jurors* (assuming for purposes of the test that they are all reasonable, intelligent, honest, just and responsible) can be demonstrated, is not only a reckless misinterpretation of this Court's pronouncements on the matter, but also such a stringent standard that, where facts existed to meet it, no presumption would be necessary because the prejudice would be actually demonstrable from the record.

As this Court made clear in *Tumey v. Ohio*, 273 U. S. 510, 532 (1927):

> "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict the defendant * * * denies the latter due process of law."

This Court's quotation of this language with approval in *Estes v. Texas*,[18] providing its own emphasis for the word "possible," bears witness to the fact that this represents the current applicable standard. See also *Fahy v. Connecticut*, 375 U. S. 85 (1963) which holds that reversal of a conviction is required when there is a *reasonable possibility* that the procedures complained of *might have contributed* to the result.

Moreover, respondent's attempt to demonstrate that there was no "actual effect" of prejudice, in the case at bar, relying heavily upon the protestations of impartiality of the jurors on *voir dire* and the determination by the trial judge that the jury was fair and impartial, is irrelevant to a consideration of whether, absent any "substan-

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[18] 381 U. S. 532, 543 (1965).

tial nexus" [16] between the publicity and the trial, a presumption of inherent prejudice will arise.

Even if the *voir dire* examination appears on its face to show that an impartial jury has been empanelled, merely going through the form of obtaining jurors' assurances of impartiality is insufficient to satisfy due process requirements.[17] For "one cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. *This is particularly true in the determination of issues involving the credibility of witnesses.*" [18] As Mr. Justice Jackson, concurring in *Krulewitch v. United States*, 336 U. S. 440, 453 (1949), has pointed out:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

Moreover, allowing the attitude of the trial judge to determine for all time the impartiality of the jury begs the question. For the trial judge's own bias resulting from the prejudicial publicity may have played a role in his determination of that very matter. See brief of *amici*, footnote 49, pp. 15-16.

It is neither necessary to examine "a particularized transcript of the *voir dire* examination of members of the jury" [19] nor to compel the accused to affirmatively demon-

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[16] *Rideau v. Louisiana*, 373 U. S. 723, 729 (1963) (Clark, J. dissenting).

[17] *Irvin v. Dowd*, 366 U. S. 717 (1961).

[18] *Delaney v. United States*, 199 F. 2d 107, 112-113 (1st Cir. 1952).

[19] *Id.* at 727 and see *Estes v. Texas*, 381 U. S. 532 (1965).

strate preconceptions of guilt[20] if the requisite nature of the publicity surrounding the trial is shown. Given such publicity, it is immaterial whether the evidence received by the jurors from the news media was inadmissible in court[21] or subsequently admitted into evidence at the trial[22] or whether confessions of guilt by the accused were published[23] or not.[24]

Within the scope of his inapposite standard, however, respondent urges specific grounds for his assertion that the publicity surrounding petitioner's trial was not prejudicial to the accused. These contentions will be met individually below.

A.

The newspaper publicity considered as a whole demonstrates that defendant, his family and his counsel induced or received favorable publicity as well as damaging news media coverage.

In an attempt to show the unprejudicial nature of the publicity here involved, defendant is charged with having instigated[25] or cooperated in obtaining[26] so much favorable publicity for himself, that "the only reasonable inference to be drawn from its nature is that no unequivocal and reasonable inference of petitioner's guilt could be formed." [27]

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[20] *Ibid.* and see *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952) and *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364 (2d Cir. 1963).

[21] *Marshall v. United States*, 360 U. S. 310 (1959).

[22] *Rideau v. Louisiana*, 373 U. S. 723 (1963).

[23] *Ibid.*

[24] *Estes v. Texas*, 381 U. S. 532 (1965). And see *Delaney v. United States*, 199 F. 2d 107 (1st Cir. 1952).

[25] PAB 29-33, 35-39.

[26] RB 55, 68-71.

[27] RB 71.

The weakness of this counterattack is manifest. While it is not here contended that in appropriate circumstances the prosecution may not respond to public statements made by the accused in limited fashion,[28] the balancing of the adverse publicity as a whole against the news articles sympathetic to accused[29] demonstrates, without more, the pitifully little assistance petitioner received from the news media in formulating favorable public opinion for himself. Self-serving statements by the accused and loyal comments by his family, attorney and friends—all normally to be expected from the guilty as well as the innocent—can hardly be expected to approach the persuasive appeal of the devastating and repeated accusations, assertions of petitioner's guilt and public review of incriminating evidence in advance of trial from such solid and apparently impartial sources as the police, detectives, prosecutors, prosecution witnesses and newspapermen.[30]

But the problem before the Court will not be solved by sifting the newspaper clippings, sorting out the "favorable" and "unfavorable" articles and balancing them against each other.

It must be remembered that it is the accused who must stand trial, it is the accused who risks his life and liberty, and it is the accused—not the state—who is guaranteed a fair and impartial jury trial by the Sixth and

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[28] It is not here contended by respondent that the spectacle in the instant case of public law enforcement authorities falling over themselves to make accusatory public comments was solely in response to petitioner's comments. The facts preclude such a contention. E.g., 56a-57a, *amici* brief in chief (unsolicited accusation of police captain on vacation in Miami).

[29] RB 68-71, appendices E, F, G, H and I. It is ironic to note that each of these examples of publicity "favorable" to the accused appears on a page which contains damaging publicity as well.

[30] Brief in chief of *amici*, pp. 17-18, 19-20, 22, 26 and examples there cited.

Fourteenth Amendments. The zeal of the accused to protect himself *at the trial level* from the effects of adverse publicity is more understandable and acceptable than similar acts of supposedly detached law enforcement authorities charged with the administration of justice.

Further, it must be emphasized that before and repeatedly during the trial the defense sought to disengage itself from the consequences of *all* of the publicity—favorable and unfavorable—by motions for change of venue, continuance and mistrial. The prosecution vigorously opposed all such attempts, apparently content with the public opinion climate in which it found itself, even after all of the "favorable" publicity petitioner is alleged to have received.

It cannot now be heard to claim that petitioner was favored by publicity whose effect upon his trial he desperately tried to avoid.

For many of these reasons, it has been held that where the defense "shared with the state responsibility for much of the publicity which made the selection of an impartial jury difficult * * * the ultimate responsibility lies with the state" and a conviction so obtained violates due process. *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364, 372 (2d Cir. 1963).

B.

The damaging publicity was diluted by the offer of evidence at the trial similar to the published matter.

Respondent attempts to mitigate the prejudicial nature of the publicity cited by *amici* by suggesting that "if evidence * * * is actually introduced * * * at trial * * * its publication prior to trial obviously has far less significance in creating * * * unfairness."[31] To but-

[31] RB 64.

tress this contention, he examines some of the examples of publicity cited by *amici* [32] and attempts to explain them away as identical to evidence subsequently offered in court under appropriate safeguards.

Amici contend that (1) much of the evidence offered at trial, allegedly identical to the pretrial publicity of which *amici* complain, was, in fact, neither identical nor similar to that which was published, and (2) even if it were similar, its advance publication without appropriate safeguards was prejudicial to the accused, in any event.

For example, respondent attempts to mitigate the prejudicial effect of an article in which a police captain called petitioner a "bare faced liar" [33] by suggesting that at the trial "the jury had more than sufficient evidence before it to indicate petitioner had been less than truthful." [34] Further, respondent suggests that the highly prejudicial statement that the murder victim had characterized petitioner (a surgeon on trial for murder) as a "Dr. Jekyll and Mr. Hyde" [35] was neutralized because the prosecution witness to whom the statement was attributed testified at the trial that petitioner had an explosive temper.[36] An article which described a woman's hearsay statement that the murder victim had planned to divorce petitioner[37] was dismissed by respondent as inconsequential because, although the woman did not testify at

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[32] Under headings II and III in brief in chief of *amici*, pp. 19-23. It is significant to note that many of the prejudicial examples cited under headings I (prosecution-induced publicity) and IV (accusatory publicity) of *amici's* brief are neither mentioned, challenged nor explained away by respondent.

[33] *Amici* brief in chief, pp. 19-20.

[34] RB 65-66.

[35] *Amici* brief in chief, p. 20, 44a-45a.

[36] RB 66.

[37] *Amici* brief in chief, 13a-14a.

trial, other witnesses testified of petitioner's infidelity to his wife and his or his wife's desire for a divorce.

It is apparent that, even in the instances challenged by respondent, the newspaper accounts were more inflammatory than the subsequent evidence in court; and/or they quoted different sources for the evidence offered in court. These variations denied petitioner the opportunity to confront and cross-examine his accusers as to the precise direct testimony against him which was published in the community in which he stood trial.

But even if *identical* evidence had been offered at trial subsequent to the publication of the same material, the prejudicial effect of the publication in advance would still have been manifest. For even accurate publicity in advance of trial, repeated at the trial may create "opinions of guilt long before trial, far removed from any safeguards against inadmissible matter." [38]

C.

The damaging publicity consisted of insinuations, surmise and conjecture rather than direct evidentiary proof of the guilt of the accused.

Respondent contends that the newspaper articles in issue "contain no direct evidence of guilt * * * or even unequivocal accusations of guilt" [39] but, rather, consist of "insinuation, surmise, and conjecture." [40] Whatever mileage respondent hopes to get from this distinction without a difference, the simple fact is that it is not true.

When a police captain urged petitioner's arrest "for investigation of murder," pointing out that "if there had

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[38] *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364, 373 (2d Cir. 1963).

[39] RB 55-56.

[40] RB 55.

been an immediate arrest, the case would have been solved in four hours,"[41] does respondent deny that this is an "unequivocal accusation of guilt"? Was the editorial inquiry: "Why Isn't Sam Sheppard in Jail?",[42] merely a matter of "conjecture"? Was the detailing in the newspaper of the "convicting evidence" against petitioner by the county coroner and the chief of the detective bureau[43] not "direct evidence of guilt"? *Amici* could continue in this vein for pages, but these few examples will suffice to make the point that no amount of wishful thinking by respondent will erase the fact that the publicity which surrounded petitioner's trial was inflammatory, pervasive, accusatory, unfair and grossly prejudicial.

D.

The damaging publicity was diluted by the time of trial because it had occurred two months earlier.

In considering the "probable effect" of the publicity on the jury, respondent finds significant his assertion that the worst of the publicity occurred more than two months before the trial.

The truth is that prejudicial publicity continued to the eve of trial[44] and throughout the trial.[45] But even if respondent's assertion were true, two months' delay between the prejudicial publicity and the trial is no impediment to a finding of inherent prejudice. In *Rideau v. Louisiana*, 373 U. S. 723 (1963), approximately two months elapsed between the publicity and the trial; in *Irvin v. Dowd*, 366 U. S. 717 (1961), the publicity ante-

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[41] *Amici* brief in chief, 56a-57a.
[42] *Id.* at 58a-59a.
[43] *Id.* at 60a-61a.
[44] E.g., *Amici* brief in chief, 32a-35a.
[45] E.g., id., 44a-45a.

dated the trial by some six or seven months; in *United States ex rel. Bloeth v. Denno*, 313 F. 2d 364 (2d Cir. 1963) about nine months elapsed between the worst of the publicity and the trial. In each of these instances, the Court reversed convictions without difficulty. The fact which is "significant" to respondent has no significance in the decided case law.

E.

Newspaper publicity is not as damaging as television exposure.

Respondent, apparently to avoid the implications of this Court's holdings in the television cases of *Rideau v. Louisiana*, 373 U. S. 723 (1963) and *Estes v. Texas*, 381 U. S. 532 (1965), dwells upon "the fundamental and obvious difference between * * * newspaper publicity and * * * television,"[46] asserting authoritatively (but without authority) that television is "more likely to create lasting impressions than is newspaper publicity."[47]

On the basis of this distinction, respondent reasons that greater proof of prejudice is required where newspapers cause damaging publicity than where television publicity is responsible for interference with fair trial.[48]

This proposed "double standard" for dealing with newspaper and television impact upon fair trials wilts upon analysis. As this Court has recently pointed out in *Estes v. Texas*,[49] while "the circumstances and extraneous influences intruding upon the solemn decorum of *court procedure* in the televised trial are far more serious than in cases involving only newspaper coverage" (presumably

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[46] RB 55.

[47] RB 60.

[48] RB 61.

[49] 381 U. S. 532 (1965).

because television cameras, lights and cables are more cumbersome and noticeable than a newspaper reporter's pad and pencil), the dangers of out-of-court publicity "are present as well in newspaper coverage." [50]

In support of this conclusion, there is scientific evidence to support the contention that the printed word will normally have much greater impact upon the average juror than their visual and aural reception of witnesses' testimony.[51] Add the fact that it has been experimentally demonstrated that all news media are capable of producing marked changes in attitudes or strong attitudes where none previously existed,[52] and it becomes apparent that, at very least, the due process problems of newspaper and television publicity in relation to criminal trials are similar and require similar legal diagnosis, treatment and cure.

F.

Selected letters to the editor refute any inference of prejudice.

In attempting to prove the "actual effect" of the pretrial publicity to be non-prejudicial, respondent calls the Court's attention to various "letters to the editors" as "the only direct evidence in the record of *any* effect the *newspaper publicity* may have had." [53] Noting that "some of those who wrote letters were * * * critical of the press and/or they still believed in the proposition that an ac-

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[50] *Id.* at 548.

[51] Murphy & Newcomb, *Experimental Social Psychology* 962, 965-966 (rev. ed. 1937); Weld & Danzig, "A Study of the Way in Which a Verdict is Reached by a Jury," 53 Am. J. Psych. 518 (1940).

[52] *Murphy & Newcomb, supra,* note 48, at 961. See also Wright, *Mass Communications: A Sociological Perspective* 49-73 (1959).

[53] RB 73; appendices A, B, C and D.

cused was innocent until proven guilty," [54] he concludes that not only was there no community prejudice *against* petitioner, "but on the contrary there is unequivocal [!] evidence of the existence of sympathy toward and a belief in the innocence of Sam Sheppard." [55] Respondent proves too much. The restatement of the argument is its own refutation. Is respondent prepared to demonstrate that the letter-writers were a random sample of the community in which petitioner stood trial? Or might a substantial argument be made for the proposition that many of those who failed to write letters to the newspapers were either deliberately or unwittingly prejudiced, saw no occasion to complain about newspaper treatment of which they approved, and failed to write at all?

II.

PETITIONER HAS WAIVED OR CANNOT NOW ASSERT A CLAIM OF PREJUDICIAL PUBLICITY.

Respondent claims further that even if the publicity in the case at bar were prejudicial, petitioner cannot now complain because of various acts or omissions of his trial counsel. These claims will be reviewed in sequence below.

A.

Defense counsel failed to exhaust his peremptory challenges in empanelling the jury.

Noting that "the defense accepted [the] jury while still having one peremptory challenge remaining," respondent asserts that "petitioner therefore should not now be heard to complain at this late date." [56]

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[54] *Ibid.*

[55] RB 74.

[56] RB 78.

This technical contention misconceives the nature of the peremptory challenge and the strong presumption against waiver of constitutional rights. *Johnson v. Zerbst*, 304 U. S. 458 (1938).

Having preserved the question of prejudicial pretrial and trial publicity by repeated motions for continuance, change of venue and mistrial,[57] defense counsel's failure to exercise all his peremptory challenges cannot be construed as a waiver or abandonment of his right to review of these constitutional questions. How many times during the course of a trial must defense counsel procedurally preserve the same constitutional question?

Moreover, as the Court in *Delaney v. United States*, 199 F. 2d 107, 116 (1st Cir. 1952) has pointed out:

> "Nor do we think it significant that the defendant failed to exhaust his peremptory challenges at the time the jury was being selected. Since he was obliged to stand trial in the hostile atmosphere engendered by the extra-courtroom publicity, he had little or no reason for assuming that one juror rather than another would be more likely to be influenced, consciously or unconsciously, by his preconceptions —all of them having affirmed * * * that they were prepared to determine [defendant's] guilt or innocence solely on the basis of evidence produced at the trial."

B.

The news clippings now in issue were not offered in evidence at the jury trial.

Amicus Corrigan asserts that the newspaper clippings collected in bulk in the five green scrapbooks certified to this Court by the Court of Appeals are somehow not before the Court because they "were not offered in evidence

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[57] *Amici* brief in chief, p. 7, footnotes 17, 18.

by the prosecution, or received in evidence by the trial court" [58] in the petitioner's jury trial, despite the fact that they were offered and considered by the District Court and the Court of Appeals in this collateral proceeding, and despite the fact that defense counsel offered them as evidence in his motion for change of venue and continuance during the petitioner's jury trial.[59]

The argument refutes itself. Suffice to say that in *Estes v. Texas*, 381 U. S. 532, 533 (1965), this Court reviewed eleven volumes of press clippings on file with the clerk without their admission into evidence at the jury trial level. For the very point of the petitioner's complaint is that *extrajudicial* evidence contained in the newspaper publicity prejudiced his trial.

C.

Defense counsel's summation to the jury waived or estopped a subsequent claim of prejudice.

Amicus Corrigan seeks to demonstrate petitioner's concession that the jury was fair and impartial by quoting from his counsel's summation to the jury to the effect that he thought them to be uninfluenced by matters outside the trial.[60] That every trial lawyer compliments the jury is well known. Having preserved the issue of prejudicial publicity by motions for continuance, change of venue and mistrial, was defense counsel obligated to assert to the jury that their fairness was in question?

Amici urge that precious constitutional rights cannot be so easily frittered away.

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[58] PAB 11.

[59] R. 1352-1354.

[60] PAB 14.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in their brief in chief, *amici* renew their prayer that this Court reverse the decision of the Court of Appeals and grant the petitioner's application for a writ of habeas corpus.

Respectfully submitted,

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